Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

WILLIAM RODEN,
A/K/A WILLIAM E. RODEN,
A/K/A WILLIAM EDWARD RODEN,
Petitioner,

V.

STATE OF MISSISSIPPI,
Respondent.

Petition For A Writ Of Certiorari
To The Mississippi Supreme Court

PETITION FOR A WRIT OF CERTIORARI

David L. Walker
Counsel of Record
Law Offices of David L. Walker
P. O. Box 719
Batesville, MS 38606
(601) 563-2514

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

(1). Whether the Petitioner's Fifth, Sixth and Fourteenth Amendments to the United States Constitution rights to due process were violated by failing to grant Petitioner's motion to dismiss for lack of proper venue at the conclusion of the evidence and after the Respondent had initially rested its case in chief.

(2). Whether the Petitioner's Fifth Amendment to the United States Constitution right to knowingly and intelligently waive his right to remain silent was violated.

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PETITION FOR A WRIT OF CERTIORARI

COMES NOW, the Petitioner, William Roden, by and through counsel, David L. Walker, and hereby petitions the Court for writ of certiorari.

OPINION DELIVERED BY LOWER COURT

On April 21, 1998, the Court of Appeals of the State of Mississippi affirmed the Petitioner's conviction of manslaughter. The Petitioner's Petition for Rehearing was denied by the aforesaid Court on May 28, 1998.

GROUNDS FOR JURISDICTION

The Court has jurisdiction in that this is a petition for a writ of certiorari from a criminal conviction alleging violation of the Petitioner's constitutional rights and involves an opinion issued by the Court of Appeals of the State of Mississippi issued on April 21, 1998, and a motion for rehearing denied on May 28, 1998, by the aforesaid Court. Petitioner's Writ of Certiorari to the Supreme Court of the State of Mississippi was denied on September 9, 1998 and filed on September 17, 1998. Please refer to Exhibit "A" attached hereto.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner alleges that his constitutional rights as set out in the Fifth, Sixth and Fourteenth

Amendments of the United States Constitution have been violated.

STATEMENT OF THE CASE

The Petitioner was indicted on April 4th, 1996, by a grand jury of the Second Judicial District of Panola County, Mississippi for the crime of capital murder. His trial commenced on October 14th, 1996, and concluded on October 17th, 1996 was tried on August 25, 1993. The jury returned a verdict of guilty of manslaughter. The circuit court judge sentenced the Petitioner to twenty years in an institution to be designated by the Department of Corrections. The Petitioner's Motion for a New Trial was denied by the circuit court judge.

On March 16, 1996, the Petitioner and a friend John Hopper were patronizing at a country-western bar in Grenada, Mississippi. They offered to give Shannon Sewell and Charles Pelts, the victim, a ride home due to the fact that Sewell had locked his keys in his car. Sewell and the victim Pelts had also been at the bar. They dropped Sewell off first at his home. As the drive continued, Mr. Pelts began to argue with Mr. Hopper over Hopper having the window rolled down on such a cold evening. Physical blows were exchanged within the passenger area of the vehicle. At some point, Hopper stopped the vehicle and all three men

began to fight. The Petitioner admitted to striking the victim in the head in self defense because the victim swung a liquor bottle at him. The victim lay unconscious on the ground, and Hopper and the Petitioner drove away. The Petitioner was questioned that next morning about the events which occurred just a few hours earlier. At the time the Petitioner was questioned, he was emotionally distraught and fatigued from lack of sleep and possibly still experiencing the effects of consuming large quantities of alcohol. This statement was used against the Petitioner at trial.

ARGUMENT FOR ALLOWANCE OF WRIT

The Petitioner's motion to dismiss for lack of proper venue after the Respondent had rested its case in chief should have been granted. Petitioner's motion was based on the fact that the Respondent failed to prove that Panola County, Mississippi, Second Judicial District, was the proper venue. Petitioner additionally asserts that Section 99-11-3 of the Mississippi Code is in direct conflict with the Sixth Amendment to the Constitution of the United States which states that crimes shall be tried in the district wherein the crime shall have been committed.

The victim's body was found near the Panola/Yalobusha County, Mississippi line. Sheriff Bryan testified that he was of the opinion that the body was found in Panola County. However, he nor any other law

enforcement officials could testify as to which county the fatal blow to the victim was inflicted. The Petitioner contends that applying strict construction and reading of the Sixth Amendment to the United States Constitution would require that the proper venue would be the county in which the fatal blow occurred. No evidence was introduced by the Respondent that Panola County was the county in which the actions occurred, only that it was the county in which the victim's body was found.

In *United States v. Cabrales*, 118 S.Ct. 1772, 141 L.Ed. 1(1998), this Court stated that "Both Rule 18 of the Federal Rules of Criminal Procedure and the Constitution require that a person be tried for an offense where that offense is committed... Also, the site of a charged offense must be determined from the nature of the crime alleged and the location of the act or acts constituting it. *Id.* At 1775. Quoting *United States v. Anderson*, 328 U.S. 699,703, 66 S.Ct. 1213, 1216(1946). Petitioner contends that the Court should apply this reasoning to the case at bar and find that the Panola County was improper venue for the crime. Since it could not be determined that Panola County was the county in which the fatal blow to the victim was inflicted, the Petitioner urges the Court to follow its holding in *Cabrales* and find that the Petitioner must be tried in the county where the actions took place.

Petitioner respectfully requests that this Court find that Panola County was not the proper venue thus violating his Sixth Amendment rights.

Petitioner's second assignment of error is that the trial court erred in denying his motion to suppress his statement given to law enforcement officers which violated the Fifth Amendment to the Constitution of the United States of America.

Petitioner was questioned by deputies of the Panola county sheriff's department the day after the incident occurred. Petitioner was advised of his *Miranda* rights, however, the Petitioner testified at the suppression hearing that he did not understand that what he said would actually be used against him. Petitioner contends that his lack of sleep, degree of intoxication, emotional state and Deputy Whitten telling him that it would be better for him to tell the truth prevented his waiver of Miranda rights from being knowingly and intelligently given.

In applying *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602(1966), to the facts surrounding the case at bar, the Petitioner did not knowingly and intelligently consent to the waiver of his *Miranda* rights. In determining whether statements given to law enforcement officials after receiving the *Miranda* warnings were voluntarily, knowingly, and intelligently given, the totality of the circumstances approach is used to determine whether due process has been violated. *Withrow v. Williams,* 507 U.S. 680, 113 S.Ct.

1745(1993). Petitioner testified that he had never been through the justice system before and that he did not understand what rights he was waiving. In addition, he was suffering from a lack of sleep and the effects of consuming large amounts of alcoholic beverages from the night before. Due to his lack of knowledge of the judicial system, the fact that he had consumed large quantities of alcohol just hours before, and suffered from a lack of sleep, the "knowingly and intelligently" requirements of the *Miranda* warning were not met by the Petitioner.

Deputy Whitten testified that the Petitioner appeared to be alert and understand what was happening. Deputy Whitten did admit that the Petitioner was visibly distraught. The deputy also testified that during the interrogation, he became aware of the fact that the Petitioner had consumed large amounts of alcohol the prior night. Upon learning of this, he continued with his questioning and did not check into the sobriety of the Petitioner. In *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1493(1964), this Court stated that a confession which was drug-induced would clearly violate a defendant's right against self-incrimination guaranteed by the U.S. Constitution. Petitioner asserts that he was still under the lingering effects of alcohol from the night before when he waived his right to remain silent.

Taking into consideration all of the factors surrounding the waiver of his Fifth Amendment right against self incrimination, the Petitioner respectfully requests that

the Court find that due to his unfamiliarity with the criminal justice system, the effects of the alcohol from the prior night, and his lack of sleep, that he did not knowingly and intelligently waive his right to remain silent. The Petitioner urges the Court to consider the totality of the circumstances as stated in *Withrow v. Williams* and find that his Fifth and Fourteenth Amendment rights have been violated.

Wherefore, the Petitioner hereby petitions the Court for writ of certiorari.

Respectfully submitted,

This the 11th day of December, 1998.

David L. Walker
(Counsel of Record)
Law Offices of David L. Walker
P.O. Box 719
Batesville, MS 38606
601-563-2514
MS Bar Number: 06896

Counsel for Petitioner

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IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 96-KA-01185 COA

WILLIAM RODEN A/K/A WILLIAM E. RODEN A/K/A WILLIAM EDWARD RODEN — **APPELLANT**

V.

STATE OF MISSISSIPPI — **APPELLEE**

ORDER

This matter is before the Court on the Appellant's motion for rehearing. After careful and thorough consideration, the Court finds that the motion should be denied.

THEREFORE, IT IS ORDERED that the Appellant's motion for rehearing be, and hereby is, denied.

SO ORDERED, this the 28th day of May 1998.

JAMES E. THOMAS, PRESIDING JUDGE
FOR THE COURT

FILED
July 28 1998
Charlotte B. Williams, Clerk
Supreme Court
Court of Appeals

IN THE SUPREME COURT OF MISSISSIPPI

NO. 96-CT-01185-SCT

WILLIAM RODEN, A/K/A WILLIAM E. RODEN,
A/K/A WILLIAM EDWARD RODEN

V.

STATE OF MISSISSIPPI

ORDER

This matter is before the Court on the Petition for Writ of Certiorari filed by William Roden. After careful consideration, the Court finds that the petition should be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari be, and hereby is, denied.

SO ORDERED, this, the 9th day of September, 1998.

LENORE L. PRATHER, CHIEF JUSTICE

TO DENY: ALL JUSTICES

FILED
September 17, 1998
Charlotte B. Williams, Clerk
Supreme Court
Court of Appeals

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 96-KA-01185-COA

WILLIAM RODEN A/K/A WILLIAM E. RODEN A/K/A WILLIAM EDWARD RODEN — **APPELLANT**

V.

STATE OF MISSISSIPPI — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO MRAP 35-B

DATE OF JUDGMENT:	10/22/96
TRIAL JUDGE:	HON. ANDREW CLEVELAND BAKER
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DAVID L. WALKER
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	ROBERT J. KELLY
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	DEFENDANT CONVICTED OF MANSLAUGHTER
DISPOSITION:	AFFIRMED – 4/21/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE THOMAS, P.J., COLEMAN, AND HINKEBEIN,JJ.

HINKEBEIN, J., FOR THE COURT:

William Roden [hereinafter Roden] was convicted of manslaughter in the Panola County Circuit Court. Aggrieved by his conviction, Roden assigns the following error to the trial court's judgment:

I. THE DECISION OF THE JURY IS AGAINST THE OVERWHELMING WEIGHT OF THE ADMISSIBLE AND CREDIBLE EVIDENCE.

II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE APPELLANT'S STATEMENT.

III. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S PEREMPTORY JURY INSTRUCTION AND CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS AND IN GRANTING THE APPELLEE'S AIDING AND ABETTING INSTRUCTION.

IV. THE TRIAL COURT ERRED IN DENYING THE APPELANT'S MOTION IN LIMINE TO EXCLUDE AND IN THE ALTERNATIVE TO LIMIT INTRODUCTION OF PHOTOGRAPHIC EVIDENCE.

V. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO DISMISS FOR LACK OF PROPER VENUE AT THE CONCLUSION OF THE EVIDENCE AND AFTER THE APPELLEE HAD INITIALLY RESTED ITS CASE IN CHIEF.

Holding Roden's assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

After getting off work on the afternoon of March 16, 1996, Charles Pelts [hereinafter victim] and a friend from work, Shannon Sewell [hereinafter Sewell], cashed their

paychecks at a local supermarket, purchased several "six-packs" of beer, and began to drink. Later that Saturday evening Sewell and the victim drove in Sewell's truck to "Partners", a country-western nightclub in Grenada, Mississippi. At the end of the evening Sewell realized that he had locked his keys in his truck. Upon learning of Sewell's predicament John Hopper [hereinafter Hopper], a former schoolmate of Sewell, offered to give Sewell and the victim a ride home. Hopper and a friend from work, the defendant Roden, had been drinking all day long and were also patronizing the "Partners" establishment. Sewell and the victim accepted the offer of a ride home, got into Hopper's 1992 Ford "Thunderbird" automobile, and the party proceeded to drive toward Enid, Mississippi. The victim had never met Hopper or Roden prior to the evening of March 16, 1996. Sewell was the only person in the car with whom the victim was acquainted.

After driving a few miles the party reached Sewell's home, at which time Sewell exited the car. This left the victim drunk and alone in a car with two strangers who were also intoxicated. The party then continued its journey toward Enid, during which time the victim apparently began to argue with Hopper over Hopper's continual smoking and having the car's front window rolled down on a cold evening. At some point the argument progressed to the point of physical blows being exchanged within the passenger compartment of the car, at which point Hopper stopped the vehicle.

Although the precise sequence of events subsequent to Hopper stopping the car was disputed at trial, apparently all of the car's occupants exited and began to fight. It is also apparent that numerous blows were exchanged between the parties, but Hopper and Roden together prevailed over the victim, who ended up lying unconscious on the ground. At trial Roden admitted to striking the victim in the head several times. Additionally, Hopper testified that Roden took the victim's wallet from the victim's body as the victim lay unconscious on the ground, and removed all of the cash from it. At trial Roden denied the allegation that he robbed the victim. It is undisputed, however, that after the fighting incident, as the victim lay unconscious on the ground, Roden and Hopper got into Hopper's car and drove away. Roden and Hopper proceeded to a nearby mobile home occupied by Hopper's sister and her roommate.

When Hopper and Roden arrived at the mobile home the occupants observed that the two men had significant amounts of blood on their hands and clothing. Hopper and Roden explained that they had been in a fight with a stranger. After spending an unknown amount of time at the mobile home, Roden and Hopper apparently returned to the area where they left the victim, so as to check on the victim's condition. Upon reaching the scene Roden and Hopper examined the victim and ascertained that he was dead. Sometime thereafter Hopper apparently called the Mississippi Highway Safety Patrol and informed them of the

fighting incident, stating that he and Roden "thought that they might have killed someone." Hopper and Roden were subsequently arrested and indicted for capital murder. Hopper pled guilty to manslaughter and robbery, while the indictment against Roden culminated in a jury trial at which Roden was convicted of manslaughter. It is from this that the instant appeal is taken.

ANALYSIS

I. THE DECISION OF THE JURY IS AGAINST THE OVERWHELMING WEIGHT OF THE ADMISSIBLE AND CREDIBLE EVIDENCE.

With this assignment of error Roden challenges both the weight and the sufficiency of the evidence supporting the jury's verdict, asserting that the trial court erred in denying his motion for JNOV/new trial. Roden claims that the State failed to prove beyond a reasonable doubt that he was not acting in self-defense during the incident at issue, and that the State failed to prove that he was the individual who struck the fatal blow to the victim. Roden further claims that "there was no evidence presented at the trial that [he] used any kind of weapon [or] object, other than his fist, to strike [the victim] in self-defense." Roden concludes that the State failed to prove that he was the aggressor and that the unrebutted proof shows that he struck the victim with his fist in self-defense.

The State responds by arguing that the conflicting evidence at trial was a factual question to be decided by the jury and the jury's verdict was not against the overwhelming

weight of the evidence, so that the trial court did not err in denying Roden's motion for new trial. Regarding Roden's claim as to the sufficiency of the evidence, the State responds that the evidence adduced at trial was sufficient to satisfy all of the elements of manslaughter, therefore, the trial court committed no error in denying Roden's motion for JNOV.

A. Weight of Evidence – Trial Court's Denial of Roden's New Trial Motion

Motions for a new trial challenge the weight of the evidence and "[implicate] the trial court's sound discretion." *McClain v. State*,625 So.2d 774, 781(Miss. 1993). New trial decisions rest within the discretion of the trial court. *McClain*, 625 So.2d at 781. A new trial motion should only be granted when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. Id. This Court, on appeal, will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. Id.

Under the facts at bar the jury was presented with the testimony of both Roden and his alleged partner in crime, Hopper. Hopper testified that both he and Roden struck the victim in the face numerous times with their fists. Roden himself admitted to using his fists to strike the victim in the face with enough force to "where he got off of me",

although Roden denied hitting the victim as hard as he could have. Roden admitted that he struck the left side of the victim's jaw with his right hand. The medical examiner testified that the victim's left jaw bone was broken and the blow which caused the break would have been serious enough to cause the brain damage that the victim suffered. Furthermore, the medical examiner testified that all of the injuries suffered by the victim were to his head and that those head injuries were the cause of death.

We consider this testimony to be clear and undisputed evidence that Roden used his fist to deliver at least one rather serious blow to the victim's head. The medical examiner clearly testified that the victim died as a result of blows to his head. In the face of such clear evidence of Roden's actions during the incident at issue we cannot conclude that the jury's verdict was so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. On the contrary, the jury's verdict of manslaughter appears to be the precise result warranted under the facts at bar. We hold that the trial court most certainly did not abuse its discretion in denying Roden's motion for a new trial.

B. Sufficiency of Evidence – Trial Court's Denial of Roden's JNOV Motion.

Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *McClain*, 625 So.2d at 778. With regard to the legal sufficiency of the evidence, all

credible evidence consistent with the defendant's guilty must be accepted as true and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* This Court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz v. State*,503 So.2d 803, 808(Miss. 1987). In conducting this analysis we are mindful that "it is hornbook criminal law that before a conviction may stand the State must prove each and every element of the offense." *Hall v. State*,644 So.2d 1223, 1229(Miss. 1994).

Regarding his challenge to the legal sufficiency of the evidence, Roden argues that the State failed to prove that he caused the victim's death by the use of a "dangerous weapon," which is an essential element of the manslaughter statute under which he was convicted. Roden states that "there was no evidence presented at the trial that he used any kind of weapon or object, other than his fist, to strike the victim. " It is Roden's contention that, as a matter of law, a human fist is not a "dangerous weapon" within the meaning ascribed to that term under the language of the statute at issue. Roden was convicted of manslaughter under Section 97-3-35 of the Mississippi Code. Section 97-3-35 states that "the killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a

dangerous weapon, without authority of law, and not in necessary self defense, shall be manslaughter." Miss. Code Ann. Sec. 97-3-35(Rev. 1994). The jury instruction used by the trial court clearly tracked the language of Section97-3-35, using "dangerous weapon" element in lieu of the "cruel and unusual manner: element, an option provided by the statute. See *Lanier v. State*, 684 So.2d 93,97(Miss. 1996)(holding that Section 97-3-35 may be read in the disjunctive).

At trial it was undisputed that Roden used his fist to strike the victim hard enough so that, in Roden's own words, "he got off of me." It is the holding of this Court that the task of interpreting whether a human fist may be considered a "dangerous weapon" as this phrase is employed by section 97-3-35 of the Mississippi Code was a factual determination to be made by the jury rather than a conclusion of law to be made by the trial Court. As such, it was within the sole province of the jury to decide if the State proved the essential elements of Section 97-3-35 beyond a reasonable doubt. *See Annaratone v. State*, 399 So. 2d 825, 826 (Miss. 1981) (holding that appellate courts do not proceed *de novo*, nor do they second guess jury's assessment of evidence nor its verdict on disputed points of fact"). Because the trial court's denial of Roden's motions for new trial or JNOV was not erroneous, we hold this assignment of error to be without merit.

II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE APPELLANT'S STATEMENT.

With the assignment of error Roden claims that the trial court committed reversible error in denying his motion to suppress the statement he gave to law enforcement officers who informed him of his *Miranda* rights prior to receiving his statement did not subject him to any threats, promises, coercion, etc., his written waiver of *Miranda* rights was not "knowingly and intelligently made." Roden contends that "his lack of sleep, degree of intoxication, emotional state and Deputy Whitten's statement that 'his best bet would be to tell him this'" prevented his waiver of *Miranda* rights from being knowingly and intelligently executed. Accordingly, Roden contends that the trial court's denial of his motion to suppress the statement effected a violation of his Fifth Amendment right against self-incrimination. The State responds that "under the applicable standard of review the finding of the trial court [were] not clearly erroneous as each [was] supported by the testimony adduced at the hearing. Consequently, there is no merit to this assignment of error and no relief should be granted."

The standard for reviewing a trial court's decision to admit a confession of confession as having been voluntarily made is well-settled. *Hunter v. State,* 684 So. 2d 625, 633 (Miss. 1996). Such findings are treated as findings of fact made by a trial judge sitting without a jury, as in any other context. *Foster v. State,* 639 So. 2d 1263, 1281 (Miss.

1994). As long as the trial judge applied the correct legal standards, his decision will not be reversed on appeal unless it is manifestly in error or is contrary to the overwhelming weight of the evidence. *Foster,* 639 So. 2d at 1281. Where, on conflicting evidence, the trial court makes such findings this Court generally must affirm. *Lesley v. State,* 606 So. 2d 1084, 1091 (Miss. 1992). Once the trial judge has determines that a confession is admissible, the defendant/appellant has a heavy burden in attempting to reverse that decision on appeal. *Sills v. State,* 634 So. 2d 124, 126 (Miss. 1994). As summarized by the Mississippi Supreme Court:

> [t]he general rule is that for a confession to be admissible it must have been given voluntarily, and not as the result of any promises, threats or other inducements. The burden is on the prosecution to prove beyond a reasonable doubt that the confession was voluntary. The burden is met and a *prima facial* case made out by testimony of an officer, or other persons having knowledge of the facts, that the confession was voluntarily mad without any threats, coercion, or offer of reward.

Chase v. State, 645 So. 2d 829, 838 (Miss 1994).

In the case at bar all of the officers who witnessed Roden's statement were called at the motion hearing and testified that, in their opinion, the statement was freely and voluntarily given. Furthermore, the officers testified that Roden did not appear to be intoxicated or under the influence of drugs at the time he executed the written waiver

of his *Miranda* rights. The officers also testified that Roden had clear speech and that he appeared to know what he was doing during the time frame at issue. To rebut the *prima facie* case made out by the officers' statements, Roden offered testimony from his brother-in-law (who apparently was present at the time of Roden's waiver of *Miranda* rights), which indicated that Roden was emotionally distraught, fatigued from lack of sleep, and possibly suffering from the lingering effects of having consumed large quantities of alcoholic beverages. Although the evidence offered by Roden tended to show that he was tired and "hung over" at the time he elected to waive his Miranda rights, even when we view this testimony in the light most favorable to Roden, it is grossly insufficient to rebut the *prima facie* presumption established by the State that the waiver was knowingly and voluntarily given. Under the facts at bar we cannot conclude that the trial court abused its discretion in denying Roden's motion to suppress the statement at issue. Thus, Roden's arguments on this point are without merit.

III. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S PEREMPTORY JURY INSTRUCTION AND CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS AND IN GRANTING THE APPELLEE'S AIDING AND ABETTING INSTRUCTION.

With this assignment of error Roden raises three distinct points that he believes constitute reversible error on the part of trial court. First, Roden takes issue with the trial

court's denial of his proposed jury instruction "D-1," a peremptory instruction. Second, Roden complains of the trial court's denial of his proposed jury instruction "D-9A," a lesser included offense instruction. Third, Roden assigns error to the trial court's granting of the State's jury instruction "S-3," an aiding and abetting instruction. For purposes of clarity we have elected to analyze separately each of Roden's three complaints and the State's responses to them.

A. Denial of Proposed Jury Instruction D-1.

Roden's proposed jury instruction D-1 was peremptory in nature and ordered the jury "to return a verdict of not guilty in this case." Roden, however, offers no argument or citation to relevant authority in support of this portion of his third assignment of error, other than to state that "[w]ith respect to the issue of whether the trial court erred in denying the [defendant's] peremptory instruction, the [defendant] herein incorporates his legal and factual argument set forth in issue number one herein." As the reader is aware, this Court has previously disposed of Roden's first assignment of error concerning the trial courts' denial of his JNOV/new trial motions, finding such to be without merit. It is apparent to this Court that Roden's request for a peremptory instruction was in substance a repeat of his earlier motions for directed verdict, just as his JNOV motion was a renewal of his last directed verdict motion. *See Johnson v. State*, 642 So. 2d 924, 927 (Miss.

1994) (explaining that directed verdict, request for peremptory instruction, and JNOV all test legal sufficiency of evidence and are examined under same s idard). Accordingly, it is this Court's holding that this portion of the instant assignment of error is nothing more than an attempt by Roden to re-argue his challenge to the legal sufficiency of the evidence, a claim which we rejected in our discussion of his first assignment of error. Because any questions regarding the legal sufficiency of the evidence with which Roden was convicted have been settled previously, this portion of Roden's third assignment of error presents no issue for this Court to review.

B. Denial of Proposed Jury Instruction D-9A.

This portion of Roden's third assignment of error focuses on the trial court's denial of his proposed lesser-included-offense-instruction D-9A, which contained a circumstantial evidence instruction. Roden acknowledges that the trial court did give a lesser-included-offense instruction; however, he is aggrieved because the instruction given was not the version that he desired. Roden argues that it was reversible error for the trial court to reject his version of the lesser included offense instruction because he believes that the facts of this case entitled him to a circumstantial evidence instruction. Roden states that he was entitled to a circumstantial evidence instruction because "there was no substantial evidence materially contradicting the [defendant's] version of his participation in the events in

question...." The State counters Roden's argument by contending that there was substantial evidence contradicting Roden's theory of the case, including that of an eyewitness to the events at issue; therefore, the trial court was not in error in denying Roden's proposed jury instruction D-9A.

The Mississippi Supreme Court has repeatedly held that "[a] circumstantial evidence instruction should be given only when the prosecution can produce neither an eyewitness nor a confession by the defendant." *E.g., Chase v. State*, 645 So. 2d 829, 850 (Miss. 1994). Under the facts at bar Roden's alleged accomplice, Hopper, testified as to the events in question. Hopper stated that numerous blows were exchanged between the parties and that both he and Roden struck the victim in his head with their fists. Additionally, in Roden's own statement (which was properly admitted into evidence) he admits to using his fist to strike the victim in the head. It is the holding of this Court that in the face of such dear eyewitness testimony, and Roden's own admissions, Roden was not entitled to a circumstantial evidence instruction. We hold that the trial court was not in error for refusing to grant Roden's proposed jury instruction D-9A, thus this portion of Roden's third assignment of error is without merit.

C. Granting of State's Jury Instruction S-3.

With this final portion of Roden's third assignment of error he contends that the trial court's granting of the State's instruction S-3 was reversible error because "there [was] no

evidence to prove that [Roden and Hopper] aided and abetted each other." Roden claims that in order for an aiding and abetting instruction to have been proper, the State must have shown that Roden "share[d] in the criminal intent of the direct actor, in this case, Mr. Hopper, who entered a guilty plea to the manslaughter and robbery of [the victim]." Roden concludes that "[t]he record is absent on the issue of whether the [State] met its burden of proof and that [Roden] shared in the criminal intent of Mr. Hopper in this case." The State responds that "[i]t is evident, notwithstanding the argument of the defendant, that this case is exactly the type of case that demands just such an instruction. Not only did this defendant consent and encourage the commission of this murder -- HE PARTICIPATED. HE HIT HIM AND HIT HIM." The State further contends that "[Roden] not only aided and abetted he was a principal. He did kill this man." The State concludes that "It]here [was] no error in granting instruction S-3 ...."

The Mississippi Supreme Court has defined aiding and abetting as

> the offense committed by those persons who, although not the direct perpetrators of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator... [a]nd such aiding and abetting may be manifested by acts, words, signs, motions, or any other conduct which unmistakably evinces a design to encourage, incite or approve of the crime, or even by being present, with the intention of giving assistance, if necessary, though such assistance may not be called into requisition.

Swinford v. State, 653 So. 2d 912, 915 (Miss. 1995). As with all jury instructions an aiding and abetting instruction must be supported by the evidence produced at trial. *Perry v. State*, 637 So. 2d 871,877 (Miss. 1994). The essence of Roden's complaint regarding the State's aiding and abetting instruction is that the evidence before the trial court did not support the granting of such an instruction. We hold, however, that under the facts at bar there was direct evidence not only placing Roden at the crime scene while his alleged co-perpetrator Hopper struck the victim, but also abundant evidence showing that Roden actively participated in the killing of the victim. Both Roden and Hopper admitted to striking the victim in the head with their fists. At a minimum Roden's admission that he struck the victim shows that Roden was an active participant at the scene of the killing and not merely a bystander, regardless of whom the jury eventually found to have perpetrated the killing. In the opinion of this Court the evidence showing that Roden struck the victim conclusively negates any possibility of him not being involved in the killing at issue. Accordingly, it is the holding of this Court that there was ample evidence to support the aiding and abetting instruction given by the trial court. *See Pleasant v. State*, 701 So. 2d 799, 803 (Miss. 1997) (holding that any person who is present at the commission of criminal offense and aids, counsels, or encourages another in the commission of that offense is an

"aider and abettor" and is equally guilty with the principal offender). This assignment of error is without merit.

IV. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION IN LIMINE TO EXCLUDE AND IN THE ALTERNATIVE TO LIMIT INTRODUCTION OF PHOTOGRAPHIC EVIDENCE.

With this assignment of error Roden asserts that the trial court committed reversible error in denying his motion *in limine* to exclude from evidence an autopsy photograph of the victim. During the trial court's hearing on his motion Roden objected to the State's photographs number thirty-eight and thirty-nine, on the grounds that "the two [photographs] that we've objected to here do not possess probative value but are more prejudicial than probative . . . and that they're overly inflammatory as well as prejudicial." The trial court granted Roden's motion as to photograph number thirty-nine, but allowed number thirty-eight to be admitted into evidence. On appeal Roden argues that although the admission of photographic evidence is at the discretion of the trial court, "applying [this] standard to the issue before the [trial] court...the photograph should not have been admitted."

The State responds that "[i]t would appear obvious to the State that this photo (#38) is not gruesome or cumulative, unduly prejudicial or objectionable. In fact it was probative of the types and location of the injury...and disfiguration of this victim. It was probative as defense

counsel repeatedly elicited testimony on where his client hit this victim." The State also argues that photograph number thirty-eight was used by an expert witness "to explain this man's death by blunt force trauma. Not much external injury but the external swelling indicative of sufficient force to cause the internal, fatal injuries." It is the State's position that "[t]here [was] no abuse of discretion in the admission of this single complained[-]of exhibit as the trial court's discretion was carefully and correctly exercised."

The Mississippi Supreme Court has repeatedly held that "[t]he admission of photographs is within the discretion of the trial judge and his decision will be upheld absent an abuse of discretion." *E.g., Hart v. State*, 637 So. 2d 1329, 1335-36 (Miss. 1994). Autopsy photographs, as with all other types of evidence, "are admissible only if they possess probative value." *Noe v. State*, 616 So. 2d 298, 303 (Miss. 1993). In the case of photographic evidence it is especially important that the photographs not be so gruesome or used in such a way as to be overly inflammatory or prejudicial. *Hurns v. State*, 616 So. 2d 3 13, 319 (Miss. 1993). The indiscriminate use of autopsy photographs showing where "a medical technician or pathologist has used the tools of his trade to puncture, sever, dissect and otherwise traumatize body parts" is discouraged. *Noe*, 616 So. 2d at 303.

Under the facts at bar the photograph in question merely shows the victim's head, from chin up, after his body had been recovered from the crime scene but prior to the

beginning of the autopsy. The photograph shows swelling and a few bruises to the facial area of the victim. The victim's right eye is closed; his left eye is open. The only cut depicted in the photograph is a slight cut in the upper right comer of the victim's upper lip. No blood, lacerated tissue, bone, or other gruesome materials are shown. Additionally, this photograph was used by the pathologist who testified at trial as an aid in demonstrating the location and extent of the wounds suffered by the victim. Under these facts we cannot hold that the trial court abused its discretion in admitting photograph number thirty-eight; it was neither gruesome nor inflammatory and was relevant to the factual issues before the jury. This assignment of error is without merit.

V. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO DISMISS FOR LACK OF PROPER VENUE AT THE CONCLUSION OF THE EVIDENCE AND AFTER THE APPELLEE HAD INITIALLY RESTED ITS CASE IN CHIEF.

With his final assignment of error Roden argues that the State failed to prove that Panola County was the proper venue for this action. Accordingly, it is Roden's contention that the trial court's denial of his motion for directed verdict, in which he raised his claim of improper venue, constitutes reversible error. Roden argues that because "no [S]tate witness testified that the fatal blows or any blows inflicted upon [the victim] by Mr. Roden occurred in the Second Judicial District of Panola County" venue was not properly established. Roden also asserts that Section 99-11-3 of the

Mississippi Code is in contravention of his rights under the constitutions of both the State of Mississippi and the United State of America. It is Roden's conclusion that "[t]he trial [court] violated these state and federal rights by falling to grant [Roden's] motion for a directed verdict to the failure of the [State] to prove proper venue." The State responds the venue was properly established at trial. The State's position is that because the Panola County Sheriff testified before the jury that the victim's body was found in the Second Judicial District of Panola County, Roden's claim that venue was not properly established is without merit. The State fails to respond to Roden's assertion that Section 99-11-3 of the Mississippi Code is unconstitutional.

The Mississippi Supreme Court "has traditionally taken quite seriously the requirement that a criminal matter be tried in the proper venue." *Clark v. State*, 230 Miss. 143, 146, 92 So. 2d 452, 453 (1957). Venue may be proven by circumstantial evidence or inferentially. *Sanders v. State*, 286 So. 2d 825, 827 (Miss. 1973). Of importance in the case at bar is a legislative enactment on the subject, Section 99-11-3 of the Mississippi Code. Section 99-11-3 holds that:

> It]he local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties... the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

Miss. Code Ann. § 99-11-3 (Rev. 1994). Our supreme court has interpreted Section 99-11-3 so that "the finding of a dead body in a particular county raises the presumption, or supports an inference, that the killing took place there." *State v. Fabian*, 263 So. 2d 773, 775 (Miss. 1972). This presumption or inference, however, is rebuttable. *Fairchild v. State*, 459 So. 2d 793, 799 (Miss. 1984). If evidence is presented to rebut this presumption, then the issue becomes one of fact for the jury to resolve. *Fabian*, 263 So. 2d at 775-77.

Under the facts at bar the Sheriff of Panola County testified-that the victim's body was found within the Second Judicial District of Panola County. This testimony, in accordance with the authority cited supra, created a rebuttable presumption that venue was proper within the Second Judicial District of Panola County. Because Roden offered nothing to rebut this presumption or make unreasonable the inference, we hold the sheriff's testimony sufficient to undergird the trial court's finding that venue was proper in Panola County. Additionally, we must also reject Roden's contention that Section 99-11-3 of the Mississippi Code is unconstitutional, as he has failed to direct this Court to any relevant authority in support of his argument. *See Ferrill v. State*, 643 So. 2d 501, 508 (Miss. 1994) (stating that court should decline to address issues on appeal for which no relevant supporting authority was offered). Of note, while researching this issue numerous decisions of our

supreme court addressing Section 99-11-3 were reviewed; none of them contained any indication that our supreme court has any reservations as to the constitutionality of Section 99-11-3. This assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY , OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO RODEN.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.